Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Mpower Petition for Forbearance and Rulemaking	)	CC Docket No. 01-117
	)	

REPLY COMMENTS OF FOCAL COMMUNICATIONS CORPORATION

Focal Communications Corporation ("Focal"), by its undersigned attorneys, and pursuant to the Commission's Public Notice, hereby submits its reply comments in the above-referenced proceeding.

The comments in this proceeding demonstrate the deficiencies of Mpower's proposal. Although Mpower's intentions may have been good, the comments from all parties underscore that Mpower misjudged the ILECs on the fundamental premise of its proposal. As opposed to Mpower's view, "FLEX contracts" would in no way encourage ILECs to treat CLECs as customers and not competitors. With this premise challenged by every CLEC and plainly belied by the ILECs themselves, there is little reason to consider Mpower's proposal further.

The ILECs, far from suggesting that they would use "FLEX contracts" to establish better relationships with CLECs, suggest that such contracts should be relieved from all regulatory requirements, including Sections 251 and 252 of the 1996 Telecommunications Act (the "Act") in its entirety. Far from promoting competition, such suggestions would ensure the demise of the competitive industry by giving the ILECs free reign to discriminate against CLECs without any regulatory protections.

Venturing down this slippery slope would be very dangerous to competition, and the Commission should avoid even beginning such a walk. The current situation, while

far from perfect, is much better than the competitive environment CLECs would endure under Mpower's "FLEX contract" proposal or the ILECs suggested changes to that proposal. Accordingly, Mpower's Petition is contrary to the public interest and should be rejected.

I. CLECs Oppose Mpower's Petition

In its Petition, Mpower argues that "FLEX contracts" would benefit CLECs because such arrangements would permit more innovative, creative deals that CLECs and ILECs could negotiate.[1] It is, therefore, quite striking that every CLEC that commented in this proceeding vigorously opposed Mpower's Petition. Most CLECs have concerns similar to those expressed by Focal in its initial comments.

CLECs pointed out that ILECs have greater bargaining power in the interconnection process.[2] While CLECs *must* obtain interconnection agreements with the ILECs to provide service, the ILECs would do quite well by *never* entering into an interconnection agreement with a CLEC. Indeed, Z-Tel noted that prior to the Act's requirement to negotiate, ILECs regularly refused to enter into interconnection agreements with CLECs.[3]

In addition, most CLECs expressed the very real concern that "FLEX contracts" would eviscerate CLEC ability to opt into any interconnection agreements. CLECs gave examples of poison pill provisions ILECs could use to ensure that each "FLEX contract"

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[1] Mpower Petition, at 10.

[2] Covad Comments, at 5-6; Z-Tel Comments, at 2-3; WorldCom Comments, at 2; Sprint Comments, at 2.

[3] Z-Tel Comments, at 2 n.3.

negotiated would only be applicable to the negotiating CLEC.[4] This very real probability is troubling and would undermine even Mpower's goals in proposing "FLEX contracts."

Finally, several CLECs raised the very legitimate legal question as to whether the Commission has the authority to forbear from requiring state approval of "FLEX contracts" under Section 252(e) of the Act and to prevent CLECs from offering "FLEX contracts" as evidence in state pricing proceedings.[5] Focal agrees that the Commission does not have legal authority to prevent a state commission, a third party with its own grant of authority from Congress, from reviewing or considering "FLEX contracts" under Section 252(e).

II. The ILEC Arguments Illustrate Mpower's Misjudgments

The ILEC comments provide decisive evidence that Mpower misjudged the competitive environment in promoting the possibility of "FLEX contract" arrangements. In their comments, the ILECs never suggest that "FLEX contracts" would encourage more reasonable treatment of CLECs as customers. To the contrary, the ILECs use the opportunity to suggest new ways they may violate CLEC rights. For example, Verizon stated, "[a]lthough Verizon will not today unreasonably refuse to begin negotiations with other carriers, the threat of sanctions if the parties fail to agree to a new FLEX contract could force Verizon to deny future requests to negotiate such agreements."[6] These are hardly the words of a converted ILEC that plans to use "FLEX contracts" to treat CLECs as valued customers. Indeed, "FLEX contracts" would do nothing to change the current attitude of the ILECs toward CLECs and the ILECs fail to suggest otherwise.

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4 Covad Comments, at 6-7; WorldCom Comments, at 2-3; Sprint Comments, at 3.
5 *See* Covad Comments, at 3-4; WorldCom Comments, at 5-7.
6 Verizon Comments, at 3.

However, the ILECs do claim that they would be willing to accept a "FLEX contract" proposal under certain "conditions." These conditions are that such arrangements would not be subject to any regulation at all, including Sections 251 and 252 of the Act.[7] In essence, the ILECs propose that the Commission completely throw out the core provisions of the Act in adopting Mpower's proposal. The audacity of the ILECs is astounding. Not only do the ILECs fail to attempt any overture toward providing fair treatment of CLECs, the ILECs plainly want to use this proceeding to be relieved from additional core provisions of the Act.

Mpower's Petition, while certainly misguided, at least recognized the unequal bargaining power of the CLECs and the ILECs and the need for some regulatory safeguards. Indeed, Mpower argued for the adoption of a new regulatory regime that would govern these arrangements. Mpower also proposed that FLEX contracts should be available to all CLECs to opt into as a whole and on a nondiscriminatory basis.

For the very reasons that the Commission should reject Mpower's petition, the Commission should be extremely skeptical of the ILECs suggested modifications to the "FLEX contract" proposal. As the Commission has stated previously, the pick and choose rules are necessary to "speed the emergence of robust competition."[8] The ILECs, however, suggest that "FLEX contracts" should not only be relieved from pick and choose, but should be relieved from any obligation of the Act. As BellSouth stated "the FLEX contract mechanism must not be subject to any of the obligations in section 251 or

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[7] Verizon Comments, at 3-4; BellSouth Comments, at 4.

[8] *Implementation of the Local Telecommunications Provisions in the 1996 Act*, CC Docket No. 96-98, First Report and Order, at ¶ 1312. (rel. August 8, 1996) ("*Local Competition Order*").

252."[9] This means that such contracts would not be available for CLECs to opt into, even as a whole. Under the ILECs scenario, "FLEX contracts" would also not be subject any nondiscrimination requirements or any regulatory review. While such an environment would certainly benefit the ILECs, it would undermine the foundation of the Act and destroy any hope of a competitive environment in the local market.

Indeed, the ILECs don't even pretend that their proposals would benefit competition or the public interest as a whole. The ILEC comments, while filled with discussions of regulatory relief, are devoid of any explanation as to how the public interest would benefit from such deregulation. This is because the ILEC proposals, if implemented, would further drive the nail into the coffin of the competitive industry. As Focal explained in its initial comments, if the Commission allowed "FLEX contracts" to exist, soon all available agreements would be "FLEX contracts" because negotiating CLECs would have no incentive to ensure that such agreements are subject to "pick and choose."[10] Under the ILECs' proposal, such agreements would not be subject to any regulatory requirements—even opt-in as a whole under Section 252(i). ILECs would be able to negotiate secret deals with certain CLECs and fail to provide even similar arrangements to other CLECs. Under the ILECs' proposal, CLECs would not be able to enlist the help of any regulatory agency to prove or penalize such discrimination.

In short, the ILECs' comments prove two very important points. First, Mpower misjudged the ILECs in believing that "FLEX contracts" would make ILECs more favorably disposed to negotiating with CLECs. Second, in this current environment,

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[9] BellSouth Comments, at 4.
[10] Focal Comments, at 4.

CLECs need every protection of the Act and the Commission should take no action that could weaken CLECs' negotiating position.

III. CONCLUSION

For the reasons enumerated above, the Commission should deny Mpower's Petition and all related proposals.

Respectfully Submitted,

/s/

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